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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 504

GERTRUDE MACDONALD,
Appellant,

vs.

LA SALLE NATIONAL BANK, CONSERVATOR,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

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Of Counsel:
NICHOLSON, NISEN & ELLIOTT.

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APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM.

Now comes the appellee, La Salle National Bank, by John R. Nicholson and Charles M. Nisen, its attorneys, pursuant to Rule 16 of the Rules of this Court, and moves (1) to dismiss the appeal from the judgment of the Supreme Court of Illinois entered March 20, 1957 in the case entitled *Gertrude Macdonald, Appellant* v. *La Salle National Bank, Conservator, et al., Appellees,* or (2), in the alternative, to affirm said judgment.

As grounds for such motion appellee states:

(a) The judgment of the Supreme Court of Illinois rests on an adequate non-federal basis, namely, that appellant failed to show that she was originally adjudged an incompetent because of a physical incapacity and therefore failed

to show wherein the alleged statutory defect adversely affected her; and

(b) The "due process" question which appellant seeks to present by this appeal (Statement as to Jurisdiction, page 4) is not a substantial federal question for the reason that the statute complained of permitted a conservator of the estate to be appointed only for one found "incapable of managing and caring for his estate," and clearly provided appellant with notice and an opportunity to be heard.

JOHN R. NICHOLSON,
CHARLES M. NISEN,
Attorneys for Appellee.

Of Counsel:
NICHOLSON, NISEN & ELLIOTT.

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OCTOBER TERM, 1957.

No. 504.

GERTRUDE MACDONALD,

Appellant,

vs.

LA SALLE NATIONAL BANK, CONSERVATOR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

Appellee respectfully submits this brief in support of its motion to dismiss the appeal from, or in the alternative to affirm, the judgment of the Supreme Court of Illinois entered March 20, 1957, in the case entitled *Gertrude Macdonald, Appellant* v. *La Salle National Bank, Conservator, et al., Appellees*, reported at 11 Ill. (2d) 122.

The reasons advanced in support of that motion are argued in order.

ARGUMENT.

I.

The judgment of the Supreme Court of Illinois rests on an adequate non-federal basis, namely, that appellant failed to show that the Probate Court of Cook County originally undertook in 1938 to adjudge her incompetent because of a physical incapacity and therefore failed to show wherein the alleged statutory defect adversely affected her.

The decision of the Supreme Court of Illinois in the case at bar rests on two grounds, each of which is independent of the other. That Court said in its opinion (Statement as to Jurisdiction, page 18):

> "In our opinion, the petitioner is not entitled to prevail; because (1) there is nothing to show that the probate court interpreted or applied the statute in the manner alleged, and (2) the statute, properly construed, is constitutionally valid."

In completing its discussion of the first reason for affirmance, the Supreme Court of Illinois said (Statement as to Jurisdiction, page 18):

> "Failing to show that the court undertook to adjudge her incompetent because of a physical incapacity, she fails to show wherein the alleged statutory defect adversely affected her."

This Court has likewise repeatedly held that one seeking to attack a statute as unconstitutional must first demonstrate that the alleged unconstitutional portion of the statute was applied to him.

Thus, in *Mallinckrodt Chemical Works* v. *St. Louis*, 238 U. S. 41, this Court said (at page 54):

> "As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him."

See also, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, and cases cited, and *Gorieb* v. *Fox*, 274 U. S. 603, 606.

Appellant seeks to avoid this result by stating:

> "The opinion of the Supreme Court of Illinois states that Gertrude Macdonald 'lived fourteen years in an institution for the feeble minded', Rec. 6, but fails to state that 'her stay there was voluntary as a part time employe and not under commitment of any court or under the care and treatment of the welfare department of the State of Illinois.' Rec. 13." (Statement as to Jurisdiction, pp. 7, 8.)
>
> * * * * *
>
> "the record is silent as to any medical findings of fact from which to establish or substantiate 'mental' incompetency." (Statement as to Jurisdiction, p. 15.)

The statement at Rec. 13 is from appellant's unsworn Petition for Rehearing. Nowhere in the record is there any suggestion that evidence was presented in the lower court to show that her fourteen-year stay in a home for the feeble-minded was "as a part time employe." Nor does her Amended Petition filed May 13, 1955, upon which her present action is based, contain any allegation that she was mentally competent when adjudged incompetent in 1938. (Rec. 3 (5-13).)

Appellant misplaces the burden of proof. As shown by the opinion of the Supreme Court of Illinois in this case, and contemplated by the rule stated in the *Mallinckrodt*

case, appellee does not have the burden of showing appellant was originally adjudged incompetent in 1938 for mental reasons. Rather, the burden was on appellant to show that such adjudication was based on physical incapacity. This she has not done.

The record clearly shows that a jury adjudged appellant an incompetent person only after it "heard the evidence adduced." Rec. 3 (3). The rule in Illinois is that the burden is on the one who makes a collateral attack, as in the instant case, to show that the "evidence adduced" did not justify the exercise of the court's jurisdiction. *Illinois Merchants Trust Co. v. Turner* (1930), 341 Ill. 101, 105, 106.

At pages 9-10 of her Statement as to Jurisdiction, appellant refers to the Mental Health Code, Chapter 91½ of the Illinois Revised Statutes. She quotes Article II, Sec. 2-2 of that Code (giving the county courts of Illinois jurisdiction over "the person of" mentally ill persons) and Article III, Sec. 3-1 (which states no person supposed to be mentally ill shall be deprived of his "liberty" except in accordance with that Act). From these provisions she apparently reasons that Illinois probate courts are deprived of jurisdiction to make an adjudication of incompetency for mental reasons and thus she must have been adjudicated for physical incapacity.

This contention not only is unsupported by Illinois law but also in no way avoids the fact that the decision of the Supreme Court of Illinois in the case at bar rests on an adequate non-federal basis.

First, the question of whether the Probate Court of Cook County had jurisdiction under the constitution and statutes of Illinois to adjudicate appellant an incompetent person for mental reasons is purely a state question, and was

decided in the affirmative by the decision of the Supreme Court of Illinois in the case at bar (Statement as to Jurisdiction, page 19).

Second, The Mental Health Code referred to by appellant (Chapter 91½, Ill. Rev. Stat., 1957), was not enacted until 1951. It deals with the commitment, detention, and care of mentally ill persons—not with the conservation of their estates.

Prior to adoption of the Mental Health Code, there had been other statutes in effect in Illinois which gave to the county courts the jurisdiction to determine the question of insanity in connection with the commitment and detention of insane persons.[1] Nevertheless, in cases involving only the appointment of conservators, the Supreme Court of Illinois has always recognized that the probate courts had inherent jurisdiction to determine the question of competency in connection with their "original jurisdiction of * * * the appointment of guardians and conservators" under Article VI, Section 20 of the Illinois Constitution of 1870 (Ill. Rev. Stat. 1937, p. 52) and the legislative act establishing probate courts in certain counties. (Ill. Rev. Stat. 1937, Ch. 37, Sec. 303.)[2] See *Snyder* v. *Snyder* (1892), 142 Ill. 60, 63-65; *Ure* v. *Ure* (1906), 223 Ill. 454, 465-466; and *Illinois Merchants Trust Co.* v. *Turner* (1930), 341 Ill. 101, 105-106.

1. The pertinent statute in effect during 1938 was "An Act to Revise the Law in Relation to the Commitment and Detention of Lunatics, and to Provide for the Appointment and Removal of Conservators, and to repeal certain acts therein named." Approved June 21, 1893. Laws of 1893, p. 140. (Ill. Rev. Stat. 1937, Ch. 85, Secs. 1-38.)

2. The provisions of Art. VI, Section 20 of the Illinois Constitution of 1870 and of the legislative act establishing probate courts in certain counties are printed in the Appendix to this Brief.

II.

The question of "due process" presented by appellant is not a substantial federal question.

Appellant challenges the definition of an "incompetent" in Section 52 of "An Act to revise the law in relation to incompetents, idiots, lunatics, drunkards and spendthrifts," Approved, March 26, 1874. (Ill. Rev. Stat., 1937, Ch. 86, Sec. 53.)

Section 52 of that Act is quoted at pages 3-4 of appellant's Statement as to Jurisdiction. For convenience we here repeat the statutory definition of an "incompetent" embraced in Section 52:

> "The word 'incompetent', as used in this Act, shall include every person who by reason of any mental or physical incapacity or incompetency is incapable of managing and caring for his estate."

The "due process" question presented by appellant is stated at page 4 of her Statement as to Jurisdiction.

In arguing that it is a substantial federal question she asserts (at page 10 of her Statement as to Jurisdiction), "Physical incompetency is constitutionally not sufficient for the appointment of a conservator," and relies on *Schaefer* v. *Haller*, 108 Ohio State 222.

That case is not applicable. The statute involved was held invalid under Section 1 of Article I of the Constitution of Ohio—not a "due process" clause.

More important, however, the Ohio statute involved (quoted at page 11 of the Statement as to Jurisdiction), authorized a guardian to be appointed for one suffering from a "physical disability or infirmity" *as such*. The Ohio statute did not contain the qualification found in the Illinois definition of an "incompetent" that the physical incapacity

must be such as to render one "incapable of managing and caring for his estate."

Appellant suggests (at page 15 of her Statement as to Jurisdiction) that such standard of judgment is "no standard". However, she cites no cases to show that incapacity to manage and care for one's estate is an inadequate standard.

The Supreme Court of Illinois in its decision in the case at bar (Statement as to Jurisdiction, pp. 18-19) has pointed to decisions in eight other states where a similar standard has been applied.[3] Obviously, people of normal mentality are subject to serious physical disabilities which, without affecting their mentality, may nevertheless for long periods of time render them incapable of carrying out or even communicating their desires respecting their property, *e. g.* a paralytic stroke. There is no reason why such persons should not enjoy the same paternal protection of their estates during such periods of incapacity that the state accords to the mentally ill.

This Court will not presume that the probate courts of Illinois will abuse the statutory standard or interpret it in a manner that would constitute a denial of due process of law. *Cf. Gorieb* v. *Fox*, 274 U. S. 603, 607.

In *Kutzner* v. *Meyers* (Ind. 1915), 108 N. E. 115, 116, the Supreme Court of Indiana had before it a statute providing for appointment of a guardian for the estate of any person found to be "incapable of managing his estate or business affairs because of old age * * *," and held that such statute constituted due process of law since it provided for notice and an opportunity for such issues to be tried before a legally constituted tribunal.

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3. For a discussion of the adequacy of such standard in giving jury instructions, see *Snyder* v. *Snyder*, 142 Ill. 60 at pp. 66-70 (1892).

Section 2 of the Act of 1874 under which appellant was adjudicated (Ill. Rev. Stat. 1937, Ch. 86, Sec. 2) provided:

"2. *Procedure for appointment of conservator.*

Sec. 2. On any petition for the appointment of a conservator of any person being filed, the court shall set said cause for hearing, summons shall be issued returnable on any day fixed by the court and service thereof shall be had upon the person for whom a conservator is sought to be appointed, in the same manner by summons or otherwise as service is had in other civil cases, excepting that where personal service of such summons is had, such service shall be had at least three days before the return day of such summons. At the time fixed for the hearing, a jury of six persons (or at the request of either the petitioner or the respondent twelve persons), shall be empaneled to try the case, except that if a person has been adjudged insane or feeble-minded in the County Court, the person petitioning the Probate Court to appoint a conservator of such insane or feeble-minded person may file in the Probate Court a duly certified copy of the record of the said County Court in such proceeding, whereupon the Probate Court shall, without further inquest by a jury or commission of physicians, appoint a conservator. The court may for good cause continue the case from time to time. If any person be found to be an insane person, as defined in this Act, who by reason of such condition is incapable of managing or caring for his estate, or a drunkard, spendthrift or incompetent person, as defined by this Act, it shall be the duty of the court to appoint a conservator for such person or his estate or both: Provided no non-resident of this State shall be appointed under this Act as conservator. No petition filed under the provisions of this Act for the appointment of a conservator shall be dismissed or withdrawn without leave of the court in which such petition is filed.

"The trial shall proceed in the same manner as near as may be as trials at law in the Circuit Court except as otherwise provided in this Act. Upon the return of the finding of the jury the court shall cause the same

to be recorded at large by the clerk of the court, and unless the court shall grant a new trial, the court shall enter the proper order in accordance with the findings of the jury. Motions for a new trial in such causes may be made orally and when so made shall be entered upon the records. (As amended by act approved June 28, 1935. L. 1935, p. 953.)"

The record shows that appellant was duly served with summons and that the issues were tried by a jury. Rec. 3(3). Appellant does not contend otherwise, and the Supreme Court of Illinois so found in the decision appealed from. (Statement as to Jurisdiction, page 18.)

Conclusion.

For the reasons stated above, we submit that the motion of appellee to dismiss the appeal from, or in the alternative to affirm, the judgment of the Supreme Court of Illinois should be granted.

Respectfully submitted,

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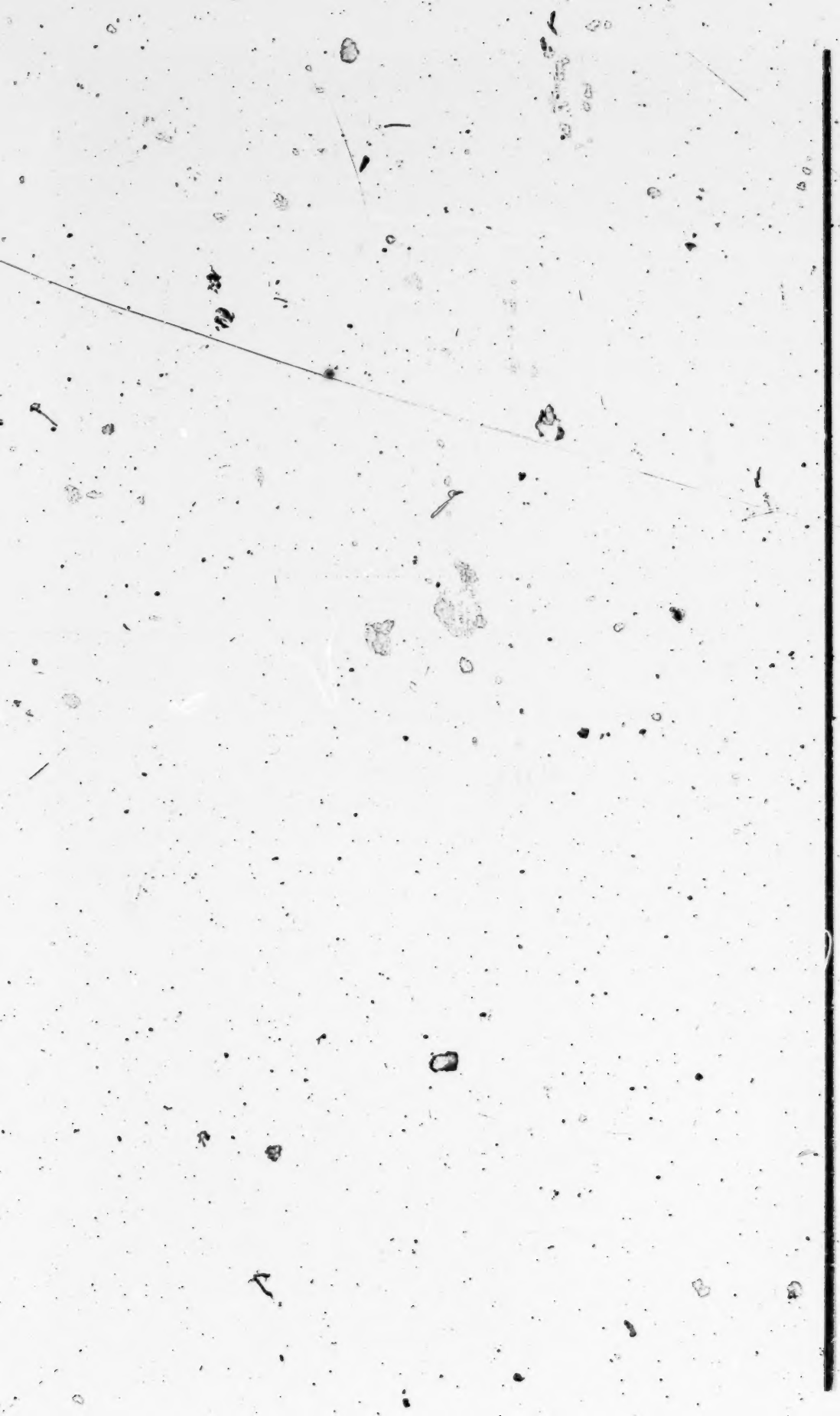

APPENDIX.

Article VI, Section 20 of the Illinois Constitution of 1870 reads as follows:

"PROBATE COURTS.

"Sec. 20. The general assembly may provide for the establishment of a probate court in each county having a population of over 50,000, and for the election of a judge thereof, whose term of office shall be the same as that of the county judge, and who shall be elected at the same time and in the same manner. Said courts, when established, shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts." (Ill. Rev. Stats., 1937, page 52.)

Section 5 of "AN ACT in relation to probate courts, defining the jurisdiction thereof, regulating the practice therein, and fixing the time for holding the same" (approved April 27, 1877. L. 1877, p. 79) reads as follows:

"Sec. 5. Probate courts shall have original jurisdiction in all matters of probate, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, and in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts. And as soon as such court is organized in any county the county court of such county shall turn over to the probate court all of its probate records, and all files, books and papers of every kind relating to probate matters in such county court, and all records,

files and papers in matters of guardianship and conservators, and the clerk of the probate court shall be authorized to demand and receive from the county clerk all such records, files, books and documents, and upon the receipt thereof, the probate court shall proceed to finish and complete all unfinished business relating to probate, guardianship and conservatory matters in the manner provided by law." (Ill. Rev. Stats., 1937, Ch. 37, Sec. 303, at p. 1023.)